

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7678

Petition of Beaver Wood Energy Pownal, LLC, for a)
Certificate of Public Good, pursuant to 30 V.S.A. § 248,)
to install and operate a Biomass Energy Facility and an)
integrated wood pellet manufacturing facility located)
north of the old Green Mountain Racetrack in Pownal,)
Vermont, to be known as the "Pownal Biomass Project")

Order entered: 1/14/2011

ORDER RE: MOTIONS TO INTERVENE AND
MOTION TO APPEAR *PRO HAC VICE*

This Order addresses motions to intervene that were filed by the following persons and entities:

Vermont Agency of Agriculture, Food and Markets ("AAFM");
Southern Vermont Citizens for Environmental Conservation & Sustainable Energy, Inc.
("SVCECSE");
Richard & Leslie Morgenthal, James Winchester, and Joseph Tornabene ("Neighbors");
Vermont Agency of Transportation ("Vtrans");
Pamela Lyttle;
Berkshire Regional Planning Commission ("BRPC");
The President and Trustees of Williams College ("Williams College"); and
Town of Williamstown, Massachusetts ("Williamstown").

In addition, this Order addresses a motion and affidavit, filed on November 17, 2010, by Williams College, seeking the *pro hac vice* admission of Daryl J. Lapp., Esq., of Edwards Angell Palmer & Dodge LLP, to appear in this proceeding on behalf of Williams College.

I note that this proceeding has a large number of parties and prospective parties, which can present challenges to an efficient process. I encourage parties with similar interests to work together in the preparation of testimony and discovery, as well as the examination of witnesses. To reduce duplicative testimony and examination, the Vermont Public Service Board ("Board") also has the authority under Board Rule 2.209(C) to require parties to join with other parties "with respect to appearance by counsel, presentation of evidence or other matters." I do not impose any such requirements at this time, but may in the future if the "interests of justice and economy of adjudication require."¹

Vermont-Based Entities

AAFM

AAFM filed a motion to intervene in this Docket on December 3, 2010. AAFM seeks to participate in this Docket with regard to 30 V.S.A. § 248(b)(4) concerning the impact the project may have upon the economic viability of Vermont's agricultural economy, including its plant nursery and maple industries, among others, and 30 V.S.A. § 248(b)(5) concerning the natural environment, specifically potential pest control and management issues. AAFM states that it has statutory interests in, and particularized knowledge and experience with, the identification, control, and management of pests and with assessment of the economic viability of Vermont's agricultural economy.

Beaver Wood Energy Pownal, LLC ("BWE-Pownal") has no objection to the intervention of AAFM² and I conclude that AAFM, given its statutory obligations and interests, has demonstrated a particularized interest with respect to Vermont's natural environment, and agricultural economy. To the extent that AAFM's interests regarding pest management may overlap with the interests of the Agency of Natural Resources ("ANR"), the parties are encouraged to work together in the preparation of testimony and discovery, as well as the examination of witnesses.

1. Board Rule 2.209(C).

2. Letter of December 17, 2010, from Hans G. Hussey, Esq., on behalf of BWE-Pownal, to Susan Hudson, Clerk of the Board.

I grant AAFM's motion on a permissive basis, pursuant to Board Rule 2.209(B), limited to the interests that it has identified in its motion.

SVCECSE

SVCECSE filed a motion to intervene in this Docket on December 13, 2010. SVCECSE states that it is a non-profit organization incorporated in Vermont. SVECSE includes 662 members; 260 of its members live or own property in Vermont and the remaining 402 members are from out-of-state, but within the vicinity of the proposed project. SVCECSE states that its mission is:

To monitor, support and promote local and regional clean renewable energy generation facilities and conservation programs, including appropriate combined heat and power systems, that are consistent with good land use, respect for our water and forest resources on a life cycle basis and consistent with least cost integrated planning (or consistent with present value cycle economic costs), are efficient, environmentally sustainable and meet clean air and water quality standards.

To involve local residents in their future energy uses by educating them and participating as an organization at local, regional and state meetings and hearings to support and defend appropriate—or, if inappropriate, oppose—energy efficiency programs and generation plants.

To hire consultants and experts and develop plans and protocols for carrying out these purposes.

SVCECSE asserts that unlike parties such as the Department of Public Service ("Department") and ANR, which will focus on Vermont-specific impacts, it has a multi-state focus and the capacity and interest to address both local and regional impacts. SVCECSE is concerned about the proposed project's impacts on the orderly development of the region, air quality, water (including quality, supply, shorelines, and floodplains), wildlife, natural resources, traffic, public investments, and the economy (including cost effectiveness and impacts on aesthetics and tourism). SVCECSE's motion specifically requests party status under the following criteria: Orderly Development of the Region (30 V.S.A. §248(b)(1)); Least Cost Service (30 V.S.A. §248(b)(2)); Economic Benefit (30 V.S.A. §248(b)(4)); and Public Health and Safety. Aesthetics, Natural Resources, and Public Investments (30 V.S.A. §248(b)(5)).

No party filed comments on SVCECSE's motion.

Given SVCECSE's interests and unique focus, as well as the fact that no party objected to the intervention, I grant SVCECSE's motion on a permissive basis, pursuant to Board Rule 2.209(B), limited to the interests that it has identified in its motion.

Neighbors

The Neighbors filed a joint motion to intervene in this Docket on December 13, 2010. The self-identified "neighbors" own businesses and residential property near or abutting the former Green Mountain Racetrack property.

The Neighbors state that they have an interest in the proposed project's impacts to aesthetics, noise, air quality, water quality (including water pollution, conservation, and supplies), wildlife, traffic, public health and safety (including river, shorelines,³ and flood plains impacts), recreational activities, orderly development, forests, and the economy.

BWE-Pownal objects to the Neighbors' intervention. BWE-Pownal asserts that the Neighbors' interests regarding impacts to their own properties will be adequately represented by the Department and ANR. In addition, BWE-Pownal requests that, if the Neighbors are granted intervention, their intervention be limited to addressing interests in their own land and be denied party status on their generalized concerns with regard to impacts on Pownal, the surrounding forests, and the Hoosic River. BWE-Pownal asserts that the Neighbor's generalized interests will be adequately represented by other parties.

No other party filed a response to the Neighbors' joint motion.

I conclude that the Neighbors, as local land and/or business owners, have sufficiently demonstrated substantial interests in the impacts of the proposed project on their property. Accordingly, I grant the Neighbors' motion on a permissive basis, pursuant to Board Rule 2.209(B), limited to the interests identified in their motion as these relate to impacts on the Neighbors' property.

3. The Morgenthals state that they do not have an interest in the proposed project's impacts to shorelines or water.

Vtrans

Vtrans filed a motion to intervene in this Docket on December 13, 2010. Vtrans' motion states that it is the Vermont state agency charged with regulating and maintaining the State's highway and rail infrastructure. Vtrans states that its sole interest in the proceeding is focused on protecting the State's transportation system and that no other party has the same level of interest or knowledge of the State's transportation system.

BWE-Pownal has no objection to the intervention of Vtrans⁴ and I conclude that Vtrans, given its statutory obligations and interests, has demonstrated a particularized interest with respect to Vermont's transportation system. Therefore, I grant Vtrans' motion on a permissive basis, pursuant to Board Rule 2.209(B), limited to the interests that it has identified in its motion.

Pamela Lyttle

Ms. Lyttle filed a motion to intervene in this Docket on December 22, 2010. Ms. Lyttle states that she owns approximately 15.8 acres abutting the proposed project area. She states that the Hoosic River acts as her property's shared boundary with the proposed project property and that she is concerned that the proposed project will jeopardize her use and enjoyment of her land. She is specifically concerned about the proposed project's impacts on air quality, the Hoosic River (including its shoreline, floodplain, water quality, and quantity), existing water supplies, wetlands, traffic, aesthetics, energy conservation, forests, municipal services and public investments, public health and safety, orderly development, and climate change. Her concerns are largely focused on the potentially adverse impacts on her property, but also include concerns about adverse impacts of the proposed project in Pownal, the region, the state, and beyond.

No party filed comments on Ms. Lyttle's motion.

Given Ms. Lyttle's proximity to the project, her unique and substantial interests, and the fact that no party objected to the intervention, I grant Ms. Lyttle's motion on a permissive basis, pursuant to Board Rule 2.209(B), limited to the interests that she has identified in her motion as they relate to impacts to Ms. Lyttle's property.

4. Letter of December 14, 2010, from Hans G. Hussey, Esq., on behalf of BWE-Pownal, to Susan Hudson, Clerk of the Board.

Massachusetts-Based Entities

BRPC

BRPC filed requests for formal party status on November 19 and December 13, 2010.⁵ BRPC states that it is the designated regional planning district for Berkshire County, Massachusetts, established under the provisions of Massachusetts' Regional Planning Law.⁶ The BRPC region shares its northern border with Vermont's Bennington County. BRPC states that the proposed project site is located 0.6 miles north of the region's shared Vermont border and that the proposed project's access road, U.S. Route 7, enters Williamstown, Massachusetts, 1.4 miles southwest of the proposed project site. BRPC states that the proximity of the proposed project site to its regional planning area and the proposed project's potential impacts on the region warrant its involvement in the Section 248 process. In addition, BRPC expresses the desire to contribute its own expertise regarding the potential Massachusetts-specific impacts of the proposed project.

BRPC states that it has an interest in the proposed project's impacts on Berkshire County's: air quality; transportation systems (specifically, impacts on its Regional Transportation Plan, noise, commuter and pedestrian safety, air quality, roadway infrastructure, congestion, permit enforcement, and delivery schedules); water supply; economy (specifically, impacts on employment and the potential increase in population in the area due to employment at the proposed project); forest communities; and orderly development.

Williams College

Williams College filed a motion to intervene in this Docket on December 6, 2010. Williams College states that its campus is in Williamstown, Massachusetts, about four miles

5. BRPC filed two sets of documents on December 13, one exclusively focused on the request for formal party status and the other addressing the adequacy of the BWE-Pownal filing and public notice. For the purposes of this Order, I am summarizing statements from the combination of all of BRPC's filings. On November 15, 2010, BRPC filed a letter designating its Executive Director, Nathaniel W. Karns, AICP, as its *pro se* representative. Mr. Karns' representation of BRPC was then formalized via its December 13 filing, which included a Notice of Appearance for Mr. Karns.

6. MASS. GEN. LAWS CH. 40B.

south/southeast of the proposed project site. Williams College also states that it owns 2,900 acres in the nearby area, including the 2600-acre Hopkins Memorial Forest ("Forest"). The Forest is located in both Massachusetts and Vermont with approximately 350 acres of the Forest located in Pownal, Vermont. At its closest, the Forest is approximately three-fourths of a mile south/southeast of the proposed project site.

Williams College expresses concern that the proposed project may adversely impact the aesthetics, air and water quality, traffic and transportation infrastructure, safety, and forests of its Massachusetts campus/lands/Forest and/or its Vermont Forest. Further, Williams College asserts that no party or prospective party is charged with, or able to represent the interests of, property owners in Massachusetts such as the College. In its motion, Williams College asks that it be granted permissive intervention pursuant to Board Rule 2.209(B).

Williamstown

Williamstown filed a motion to intervene in this Docket on December 8, 2010.

Williamstown states that it is located in the northwest corner of Massachusetts, bordering both Vermont and New York. Williamstown states that the proposed project site is 1.5 miles from the Massachusetts/Williamstown border on U.S. Route 7 and four miles from the town's population center, its business district, and the Williams College campus.

Williamstown expresses concern that the proposed project may adversely impact the aesthetics, air and water quality, wildlife, traffic and transportation infrastructure, public health and safety, forest quality, orderly development, and economic stability and viability of the Town. In addition, Williamstown also expresses concerns about the potential impacts in surrounding communities. Further, Williamstown asserts that no party or prospective party is charged with or able to represent the interests of the Town, including the Department, ANR, and AAFM, which it states are specifically charged with addressing Vermont-related impacts. In its motion, Williams College asks that it be granted permissive intervention pursuant to Board Rule 2.209(B).

Responses

On December 15, 2010, BWE-Pownal responded to the interventions of Williamstown and Williams College. BWE-Pownal asserts that the Board's Section 248 jurisdiction over a proposed in-state generation facility's impacts ends at the Vermont border and, as such, the Board cannot grant interventions based on the potentially adverse out-of-state impacts of a proposed in-state generation facility.⁷ Based on this assertion and because Williams College and Williamstown are Massachusetts-based entities that raise potentially adverse out-of-state impacts as a basis for intervention, BWE-Pownal objects to the interventions of Williams College and Williamstown. BWE-Pownal also objects to the Williamstown and Williams College motions based on their failure to demonstrate a particularized interest sufficient to warrant participation on any topic. In addition, BWE-Pownal objects to Williams College's motion because the college failed to "adequately identify the criteria on which it seeks to participate."⁸

On December 17, 2010, Williamstown filed a response to BWE-Pownal's objections to its motion to intervene. Williamstown's response refuted BWE-Pownal's objections to its intervention and reiterated its request to intervene.

On December 20, 2010, Williams College filed a response to BWE-Pownal's objections to its motion to intervene. Williams College's response refuted BWE-Pownal's objections to their intervention and reiterated their request to intervene.

On December 27, 2010, BWE-Pownal filed a response to BRPC's motion to intervene. BWE-Pownal's response once again asserted that the Board has no jurisdiction over extra-territorial impacts and that the Board should therefore deny BRPC's intervention because BRPC seeks review of out-of-state impacts. In addition, BWE-Pownal states that BRPC failed to demonstrate any sufficiently particularized interest and instead presented "merely generalized concerns no different than those of any Vermont citizen residing in the vicinity of the Project" or held by the State of Vermont, Pownal, or the Bennington County Regional Commission.

7. BWE-Pownal cites the Vermont Supreme Court decision, *In re Twenty-Four Vermont Utilities*, 159 Vt. 339, 618 A.2d 1295 (1992), in support of this assertion.

8. "An example of this is the Colleges' reference to forest quality which could be construed as including air quality, water quality, traffic, and erosion."

No other party filed responses to the Massachusetts-based entities' motions.

Discussion

BWE-Pownal is correct that the Board does not have jurisdiction beyond the borders of Vermont. However, the Board clearly has jurisdiction over any impacts arising from a proposal to site a generation facility within the state. Construction and operation of the proposed project have the potential to generate impacts outside of Vermont, and the Board has jurisdiction to impose conditions that would mitigate those impacts. Given the close proximity of the proposed project to Massachusetts, there is a possibility that residents of Massachusetts will face greater impacts from the proposed project than will Vermont residents. The only opportunity for anyone potentially impacted by the proposed project to attempt to mitigate such impacts is through the Board's review of the proposed project under Section 248, and BWE-Pownal has not provided sufficient justification for why out-of-state residents potentially impacted by the proposed project could not avail themselves of that opportunity.

BWE-Pownal's reliance on the Vermont Supreme Court's *In re Twenty-Four Vermont Utilities* decision, is misguided.⁹ The Board decision on appeal in *In re Twenty-Four Vermont Utilities* involved a petition to approve a contract for the purchase of power from Quebec-based hydroelectric facilities rather than a petition for a certificate of public good to construct an in-state generation facility. Since the Board was not reviewing the potential impacts of an in-state facility, it did not rule on whether it was appropriate to consider impacts beyond Vermont's borders.

Given the proximity of the proposed project to Vermont's border, I conclude that the scope of this proceeding will include consideration of the proposed project's in-state and out-of-state impacts on each Section 248 criterion. I also conclude that where the Massachusetts-based entities' interests involve criteria related solely to impacts on Vermont, such as Section 248(b)(4),¹⁰ the Board will consider the proposed project's out-of-state impacts only to the extent that they may affect Vermont and its ratepayers.

9. 159 Vt. 339, 618 A.2d 1295 (1992).

10. Pursuant to Section 248(b)(4), the Board must find that a proposed project "will result in an economic benefit to the state and its residents."

Second, Williamstown, Williams College, and BRPC have clearly demonstrated particularized interests sufficient to warrant participation in this proceeding. I find that the proceeding will benefit from the inclusion of their unique perspectives which differ substantially from those of the Department, ANR, and AAFM, which focus primarily on Vermont-related impacts.

Lastly, Board Rule 2.209(B) states that the Board may grant permissive interventions "when the applicant demonstrates a substantial interest which may be affected by the outcome of the proceeding." Thus, pursuant to Board rule, applicants are not required to identify the specific criterion/criteria under which they wish to intervene. Therefore, BWE-Pownal's objection to Williams College's motion because the college failed to "adequately identify the criteria on which it seeks to participate"¹¹ cannot be sustained. As discussed below, Williams College has clearly demonstrated several substantial interests which may be affected by decisions issued in this proceeding.

I conclude that Williams College, Williamstown, and BRPC, given their close proximity to the proposed project site and their potential to be uniquely and adversely affected by the proposed project, have demonstrated substantial interests in this proceeding and I grant these entities permissive intervention, pursuant to Board Rule 2.209(b), limited to the interests identified in their respective motions.

Motion for *pro hac vice* participation

On November 29, 2010, BWE-Pownal filed a response, stating that it had no objection to the Williams College motion for *pro hac vice* admission. Williams College's motion for *pro hac vice* admission of Attorney Lapp sufficiently addresses all of the requirements of Board Rule 2.201(C) and, I have received no comments opposing the motion, therefore the motion is granted.

SO ORDERED.

11. "An example of this is the College's reference to forest quality which could be construed as including air quality, water quality, traffic, and erosion."

Dated at Montpelier, Vermont, this 14th day of January, 2011.

s/ Edward McNamara
Edward McNamara, Esq.
Hearing Officer

OFFICE OF THE CLERK

FILED: January 14, 2011

ATTEST: s/ Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)